

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: SJ-2021-0238

SUPERIOR COURT DEPARTMENT
SUFFOK SUPERIOR COURT
Docket No. 1884CR00489

COMMONWEALTH

vs.

DARIO BAXTER

RESERVATION AND REPORT

The matter came before me on the defendant's petition for relief pursuant to G. L. c. 211, § 3, from the denial of his motion to dismiss his case on double jeopardy grounds after the jury at his first trial were unable to reach a verdict and the trial judge declared a mistrial. The defendant asserts that, because there was insufficient evidence before the jury on several critical elements of the Commonwealth's case, to require him to submit to a retrial would violate his rights against double jeopardy. The Commonwealth opposed the motion on the ground that, it asserts, viewed in the light most favorable to it, a reasonable jury could have found all elements of the crimes charged beyond a reasonable doubt.

While relief under G. L. c. 211, § 3, is extraordinary, a petition under that statute is appropriate where a question of double jeopardy has been raised. As the full court explained in Commonwealth v. Adams, 485 Mass. 663, 669 (2020),

"Although we conclude that a double jeopardy claim must be considered even if it is raised for the first time after a defendant's retrial, it is distinctly advantageous to a defendant to raise such a claim before retrial. Otherwise, the defendant risks not only an erroneous conviction, but also the irremediable loss of the right not to be tried twice for the same offense. That is also why we routinely provide appellate review of double jeopardy claims before a retrial, where a defendant seeks relief under G.L. c. 211, § 3, from the denial of a motion to dismiss on double jeopardy grounds, brought after the defendant's trial ended in a mistrial, but before the retrial."

After carefully reviewing the record from the defendant's first trial, including the exhibits, which incorporate video recordings and still photographs of the scene where the victim collapsed, I agree that the issues the defendant raises should be considered by the full court.

The victim was shot as he walked along a sidewalk, by a man who approached him from behind. The shooter is alleged to have walked from a vehicle which drove past the victim, then parked around the corner on a side street; the shooter then returned to the vehicle, as the victim fled down the street, then collapsed. The Commonwealth's theory of the case is that a rear seat passenger served as a lookout, and the defendant was the driver.

Two residents who live in a building near where the shooting occurred were awakened by gunshots and saw through their windows one or two individuals returning to the suspect vehicle. Both witnesses saw a man with a red jacket getting into the front passenger seat, and a man wearing a gray sweatshirt walking toward the vehicle; one witness saw the man in the gray sweatshirt getting into the driver's seat. The driver of a second vehicle that turned onto the street where the men had entered the suspect vehicle saw three individuals inside it as he reversed out of the street so it could pass. Surveillance video from nearby houses and businesses captured the suspect vehicle driving in the area, and also the victim's collapse; no surveillance footage shows the individuals' interactions with the suspect vehicle.

The defendant challenges the sufficiency of the evidence that the suspect vehicle was his girl friend's Honda, that he was the driver, and that he shared an intent to kill the victim, or even was aware that the shooter was armed. While the Commonwealth asserts that the video recording of the Honda being driven in the area shows a driver who resembles the defendant, the defendant disputes that it is possible to discern the identity of the driver from the fuzzy surveillance footage and given the dark tinted windows on the vehicle; neither the still shots of the Honda nor the surveillance footage appear to allow

any identification of the driver, even as to race or gender, so a determination that the defendant was the driver would have to rest on inferences drawn from other evidence.

With respect to the question of shared intent, given the absence of any evidence of motive, or prior discussion among the alleged co-venturers, as well as the suggestion of a motive for a third party, the Commonwealth appears to rest heavily on the positioning of the vehicle in which the shooter was thought to be the front seat passenger to infer a shared intent to kill the victim.

I therefore reserve and report the case for determination by the full court. The record shall consist of the following:

1. the application for leave to appeal defendant's motion to dismiss on double jeopardy grounds pursuant to G. L. c. 211, § 3;
2. the Commonwealth's opposition to defendant's G. L. c. 211, § 3 petition for extraordinary relief from the denial of his motion to dismiss;
3. the appendix for the Commonwealth;
4. the docket sheets in SJ-2021-0238;
5. a statement of agreed facts;
6. this Reservation and Report.

The petitioner is designated the appellant. This matter shall proceed in all respects in accordance with the Massachusetts Rules of Appellate Procedure. The parties shall consult with the Clerk for the Commonwealth regarding a schedule of briefing.

By the court,

Dalila Argaez Wendlandt

Dalila Argaez Wendlandt
Associate Justice

Entered: